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In the Supreme Court of the United States

October Term, 1982

PAUL ROBERTS BENEDETTO,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. HAS THE TRIAL COURT DENIED A BLIND DEFENDANT HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION AND EFFECTIVE ASSISTANCE OF/ TO COUNSEL WHERE ADEQUATE SAFEGUARDS OF PROCESSES OR PROCEDURES WERE NOT PROVIDED TO PERMIT HIM TO EXAMINE THE CONTENTS OF DOCUMENTS BEING PLACED IN EVIDENCE AND WAS NOT PROVIDED SUFFICIENT TIME NECESSARY TO BECOME FAMILIAR WITH 28 USCA 3500 MATERIAL IN A TRIAL WHERE 20,000 PAGES OF EXHIBITS AND/OR 3500 MATERIAL WERE THE GOVERNMENT'S CASE.

II. WHETHER DEFENDANT'S PRIVILEGE AGAINST SELF-INCRIMINATION WAS PROPERLY PROTECTED BY THE TRIAL COURT AT THE EVIDENTIARY HEARING, CONDUCTED FOR THE PURPOSE OF DETERMINING WHETHER AN IMMUNIZED STATEMENT TAINTED THE GOVERNMENT'S CASE WHEN THE STATEMENT WAS READ BY THE PROSECUTING ASSISTANT UNITED STATES ATTORNEY AND WHEN THE TRIAL COURT REFUSED DEFENSE ATTORNEY'S

REQUEST THAT FOUR FBI AGENTS BE PERMITTED TO TESTIFY WHO HAD DIRECT PERSONAL KNOWLEDGE OF TAINT, AND INSTEAD PERMITTED ONLY THE TESTIMONY OF THE ASSISTANT U. S. ATTORNEY WHO HAD PROSECUTED THE CASE AND WHO POSSESSED ONLY HEARSAY INFORMATION AS TO THE TAINT ISSUE.

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JURISDICTION

Judgment was entered against Paul Roberts Benedetto on February 8, 1982 in the United States District Court for the Southern District of New York.

Notice of Appeal was filed February 11, 1982 in the Court of Appeals for the Second Circuit; Appeal was denied September 15, 1982.

Defendant filed Petition for Rehearing and suggestion that the case be heard en banc on September 27, 1982; Denied on October 27, 1982.

It is believed that 28 USCA Sec. 1254(1) confers statutory jurisdiction for this court to review the judgment by Writ of Certiorari.

AMENDMENT V--CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI--JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTE: 29 USCA 794. Non-discrimination under Federal Grants and programs; promulgation of rules and regulations.

No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments of this section made by the

Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978.

STATEMENT OF THE CASE

How Federal Question Presented

The jurisdiction of the District Court was invoked under Title 18, USC, Section 1341, 1343, and 2, 2314 and 2.

Facts As to Question I

Paul Roberts Benedetto[1] was 59, totally blind from birth, and was suffering from hypertension at the time of trial in which the Government's case consisted of 20,000 pages of exhibits and/or material that qualified for 29 USCA 3500 treatment. Benedetto had difficulties attendant to his handicap which required consideration by the court to insure he was accorded a fair and constitutional trial.

Benedetto's attorney, Mr. Liotti, made certain pretrial requests which directed themselves toward accomplishing that goal. Specifically, the defense attorney requested, among other things, that all exhibits be transcribed into Braille (motion dated 8/5/81); that

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[1]Sometimes referred to as Roberts or DiBenedetto.

defendant be given all 3500 material at least two weeks prior to trial; that Benedetto have the use of a specialized secretary able to work days and evenings to transcribe defendant's Braille notes for defense counsel; that all exhibits be read aloud to Benedetto (motion, 3/81); and that some time be permitted in order to confer with defense counsel after each exhibit was read (motions 7/20/81 & 8/16/81 ; mailgram to Judge Sands, 8/19/81) that the court hear testimony of Louis Rigdon of the U.S. Department of Justice (motion 8/16/81) who would have enlightened the court as to what safeguards or procedures were necessary to afford the defendant a fair trial in light of his handicap and the nature of the trial; and would have revealed to the court the Justice Department's 5-year non-compliance with 29 USCA 794.[2]

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[2]Section 794. Non-discrimination under Federal grants and programs; promulgation of rules and regulations. No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance or

In a letter to the Honorable Daniel Moynihan, William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, writes in part:

> . . . The Department of Justice *has not yet issued* regulations to implement the 1978 amendment to Section 504 of the Rehabilitation Act of 1973 (29 USC 794) which prohibits discrimination on the basis of handicap in programs and activities conducted by Executive agencies, *we recognise that the statute provided imposes an obligation to provide effective communications to persons with visual impairment*. . . . (Emphasis added)

The trial court refused the defendant's request that all exhibits be transcribed into Braille and that the court hear the testimony of Louis Rigdon. The lower court also denied the defendant's request that all 3500 material be delivered 2 weeks prior to trial, although the trial court did order that 3500 material be delivered 2 days prior to a witness' testimony.

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under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments of this section made by the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978.

In addition, the trial court denied the defendant's request for a specialized secretary[3] although it ultimately authorized an escort to lead him around the court and its environs approximately 3 days into trial. However, of the 39 days of trial, she was available only 4 or 5 days for 1 or 2 hours per day. The trial court also denied the request that all exhibits be read to the defendant, although it did permit exhibits drafted in foreign languages to be translated and did subsequently order that exhibits be read to Benedetto while he was testifying. The court made no further provisions to insure that any exhibits were read to Benedetto. In a few instances, when defense attorney and/or escort were not otherwise engaged, an attempt was made to read exhibits to Benedetto, although this rarely occurred.

On many occasions during the trial, the

[3]Co-defendant Dorowshow was Benedetto's assistant for 11 years and performed virtually all tasks that related to or required sight. Benedetto, to a great extent, was dependent on her although it is possible that any adequately trained specialized secretary could have performed the same functions during trial.

Assistant U.S. Attorney (AUSA) failed to deliver the 3500 material 2 days prior to a witness' testimony which effectively negated the court's own minimal determination of what period of time was necessary for Benedetto to review the 3500 material to permit its utilization during cross-examination. However, even when the material had been delivered as ordered by the court, the sheer bulk of the material and the distance between defendant's home and his attorney's home made it virtually impossible for Benedetto's defense attorney to actually read all the material to him in the 2 nights prior to trial, especially when the trial days were consecutively scheduled which required that the defendant concentrate on the next day's material.

Many times, the court's refusal to permit the defendant the means, via a specialized secretary, to have the exhibits, which were presented into evidence, read to Benedetto resulted in the defendant's ignorance of the testimony as to that document and effectively

prevented communication between Benedetto and his attorney relative to that testimony. When the exhibits were read to Benedetto, either by his attorney or his escort, the defendant was placed in the position of having to listen to the reading of the document and the testimony simultaneously. This prevented his full attention to both matters and effectively transformed a visual handicap into an auditory disability.

On September 9, 1981, about half-way through the trial, Mr. Benedetto suffered a courtroom attack of hypertension which is described to the Court by Ms. Stringfield (TT, 9/9/81, p. 1427, lines 4-12) as follows:

> MS. STRINGFIELD: Mr. Benedetto, his blood pressure is 190/100 on his left arm. On his right arm it is 186/120. His temperature is 99° He is complaining of numbness in his hands, complaining of having hot flashes, of chills. His face is flushed. His skin is moist. He is very warm. At this point, I just feel that he needs to rest, more so than anything. It's just that his blood pressure is really going up. I wouldn't want it to go up any higher.

This attack resulted in Benedetto's hospitalization for 11 days. When released, he was

required to take 10 mg Valium, 3 times a day; Tylenol III (with Codeine), 2 every 4 hours; and 4 Endcrides, 2 am and 2 pm for the remainder of the trial to control his condition. However, these drugs have a potentiating effect which resulted in defense attorney's request September 21, 1981 (TT, 9/21/81, p. 1469, lines 9-13) for an assessment from Dr. Altman about whether Benedetto would be able to pay attention to the proceedings. Liotti explained at page 1473 of the transcript:

> . . . Benedetto is extremely incoherent, extremely lethargic, and is unable to follow any conversation on the phone.

The record is devoid of any testimony by Drs. Landau, Altman or Krakoff as to Benedetto's condition in general and the effect of the prescribed drugs on his ability to understand the proceedings, his competency to participate in his own defense or the effect of those drugs on his alertness. The record indicates that the court intended to personally talk to Dr. Landau by phone at 7 pm on 9/21/81. There is no record of that conversation, how-

ever, nor of the opinion of the doctor. Nevertheless the court decided and ordered that the proceedings should continue.

In summary, the trial court denied defendant's request that exhibits be transcribed into Braille, that all 3500 material be delivered 2 weeks prior to trial, that defendant be provided a specialized secretary, and that Louis Rigdon be permitted to testify concerning Dep. of Justice's 5-year non-compliance with 29 USCA Sec. 794. In addition, the trial court failed to make adequate determination of Benedetto's competency and did not hold any hearing on the record as to his ability to proceed and assist in his own defense.

Facts as to Question II

On January 7, 1982 the lower court held an evidentiary hearing to determine whether the information collected by the government was tainted by the information received from Benedetto in a 26-page transcript responding to questions posed by German police officials in the presence of FBI Agent Zane on May 23, 1979.

Agent Zane promised:

> Any statement that you do make to the German police at this time will not be held against you in the United States Courts in the event of any eventual prosecution of yours, except for impeachment purposes if you take the stand in your own defense in any subsequent trial.

The tape of those questions and Benedetto's answers were delivered to and transcribed at the direction of Special Agent Fuller,[4] Chief Investigator of the Benedetto, et al., case (Evidentiary Hearing [hereinafter referred to as EH; all EH material was dated 1/7/82] p. 167, lines 8-9) who had been conducting an investigation since 1977.[5]

On May 24, 1979, one day after the May 23, 1979 interview with German police officials

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[4]Q. Did Mr. Fuller ask you to do something?
A. Yes.
Q. What did he ask you to do?
A. He asked me to assist two police agents from Frankfurt, Germany to interview Mr. Benedetto concerning a fraud investigation they were conducting in Germany. (7/29/81, TT, p. 124, lines 17-23, Zane testifying
and
Q. What did you do with the statement after you took it?
A. We took the tape recording back to the office and I believe I gave it to Agent Fuller for transcription, he would have had it transcribed. (7/29/81, TT, p. 153, lines 12-16, Zane testifying.)

[5]Government's memorandum of law in opposition to defendant's motion to dismiss the indictment, to suppress evidence and for other relief, 4/27/81, p. 8.

which resulted in the 26-page German transcribed statement, Agent Fuller presented his case to Shirah Neiman, Chief of the Major Crimes Unit, for a prosecutorial opinion.[6]

Later, on August 14, 1979, Agent Fuller also requested a prosecutorial opinion of Alan P. Kaufman, Chief of Organized Crime Unit.[7] The German statement was treated as tainted by AUSA Manning beginning in August, presumably after he was assigned on the 20th of August.[8]

The purpose of the evidentiary hearing was to determine:

> . . . whether the investigation which led to the indictment in this case is, in fact, a product of that statement or leads contained in that statement or is based on independent sources. (The Court, EH, p. 130, lines 4-8.)

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[6] See anti, page 12-16.

[7] Kaufman affidavit, dated January 13, 1982.

[8] Q. Mr. Manning, do you recall when you were assigned the investigation and prosecution of this case?
A. Yes.
Q. When was that?
A. That was on August 20, 1978.
Q. Prior to 1978 - -
A. 1979.
(EH, p. 133, line 22 - p. 134, line 4)
Manning on cross: "...starting in August of 1979, that I have treated the 26 page statement as if it was tainted material." (EH, p. 162, lines 4-6.)

The only person who testified at the January 7, 1982 Evidentiary Hearing was Assistant U.S. Attorney (AUSA) Manning, who prosecuted the case and who was not assigned until August 20, 1979 (EH, p. 170, lines 3-6) some three months after the May 23, 1979 German interview. On cross-examination of AUSA Manning, (EH, p. 166, line 20 - p. 167, l. 15) he responded to questions by Defense Attorney Liotti about the 26-page German statement:

Q. Do you know if Agent Fuller made any notes from this document or from a copy of it?
A. *I have no idea.*
Q. Do you know if he used any notes in connection with his investigation as far as this document was concerned?
A. *I do not know* whether he made any notes of that document and I have no idea whether, if he did make notes on that document, he used them.
Q. Would it be your testimony that Agent Fuller's investigation continued after August of 1979?
A. He was the case agent in charge of the case so *I believe* his investigation continued.
Q. Is it your testimony that you do not know whether Agent Fuller used this document or any notes derived from the document after your meeting with him on August 20, 1979?
A. *I do not know whether he did.* He

was instructed not to by me.

It becomes evident that AUSA Manning did not know the answers to important questions that related to the use of the German statement between May, 1979 and approximately August 20, 1979. Because he had been investigating Benedetto since 1977, Agent Fuller should have been questioned since Manning was not assigned to the case until August, 1979.

At page 170, (EH, line 7 to p. 174, l. 10) Mr. Liotti questioned AUSA Manning regarding whether his office had contemplated further investigation.

Q. But it would be fair to say that until Mr. Benedetto's meeting with the West German authorities in May of 1979, that your office really hadn't contemplated an investigation, a further investigation of Mr. Benedetto or an indictment, isn't that true?

A. *I can't speak for the office, but I did not even know an investigation existed until August of 1979.*

Q. *Do you know whether your office did contemplate an investigation or an indictment prior to May of 1979?*

A. *I don't know whether they contemplated that.*

Q. How much - -

MR. LIOTTI: Excuse me your Honor, (pause)

THE WITNESS: *May I amend my answer. I know that in the file there are some notes I believe by Miss Neiman in May of 1979. I do not know whether they relate to an investigation or an indictment decision but I know that document does exist.*

Q. Do you know of your own knowledge when this case was referred to the U.S. Attorney's office by the FBI?

A. *No.*

Q. Do you know if Mr. Kaufman's memorandum would disclose that fact to us?

A. *I do not know.* I know that there is a practice whereby agents come in and ask for prosecutive opinions but I do not know whether the May meeting of 1979 was the first such occurrence in this matter.

Q. I am sorry I don't understand the last part of your statement.

A. There is a document which appears to be in Miss Neiman's handwriting in May of 1979, and that document may or may not be a decision to start an investigation, but that is nothing but hearsay from the document.

MR. LIOTTI: *Your Honor, I would ask for permission at this time to at the conclusion of Mr. Manning's testimony call Miss Neiman and Mr. Kaufman to clarify this question. I think it is very important.*

THE COURT: Clarify which question?

MR. LIOTTI: The question of when the FBI first turned over this case to the U. S. Attorney's office for further inquiry or prosecutorial opinion, as Mr. Manning describes it.

THE COURT: May I see Court Exhibit 1 please?
MR. LITT: It is listed here as Court's Exhibit A.
THE COURT: *Mr. Manning, you believe that the handwritten form is in Miss Neiman's handwriting?*
THE WITNESS: *I think it is possible. That is speculation, but I think that is correct.*
THE COURT: That bears in the handwriting of the person who wrote the rest of it, and it is a form which is called Prosecutive Opinions, somebody has written across it something which I can't read - -
THE COURT: *"Go forward with"*
MR. LITT: *I believe the initials are "SN" for Shirah Neiman.*
THE COURT: Would she put her own initials on it?
MR. LITT: *I believe she would indicating she made the recommendation.*
THE COURT: *"Go forward with it. Come back when ready for full review and assignment."*
MR. JACOBS: Could we have the date of it, your Honor?
THE COURT: *May 24th. Special Agent Fuller.*
Take a look at that, Mr. Manning, and see whether that sheds any light on the question of when it is that the U.S.Attorney's office reached any determinations concerning further investigation or any prosecutive opinions.
THE WITNESS: *I cannot tell from this whether a decision was made to prosecute.* It looks to me to be some more evidence and come back and talk about it fully, but this is reading someone else's handwriting. I know that the case

was not assigned or established in the office until I was assigned it in August of '79.

MR. LIOTTI: If I may intercede for a moment, your Honor, I think we have a problem here inasmuch as Mr. Manning's involvement in the case apparently ensued in August of 1979. Some significant developments may have occurred before that time.

What I would urge the court to do is adjourn this hearing until the early part of February when Mr. Manning returns and I would ask for a full and complete hearing at that time.

THE COURT: On what? Just tell me on what?

MR. LIOTTI: *Your Honor, it is apparent to me at this point that the FBI decided to continue its investigation of Mr. Benedetto after their meeting with Mr. Benedetto and the West German authorities and that the U.S. Attorney's office decided to do that as well after that meeting.*

I would like to know whether and to what extent that interview had a bearing on the ultimate prosecution of Mr. Benedetto. That is what this hearing, I thought, was all about your Honor. (Emph. added.)

This portion of the transcript shows that AUSA Manning did not know whether investigation was contemplated prior to May of 1979, that he believed some notes written by Miss Neiman existed, but did not know if it related to an investigation or indictment decision; that he

did not know if the prosecutorial opinion presented at the hearing was in the handwriting of Miss Neiman; that he did not know if a decision was made to prosecute.

In addition, Mr. Liotti requested a full and complete hearing, permission to call Miss Neiman and Mr. Kaufman for the purpose of determining what effect the interview by the West German authorities had on the ultimate prosecution of Mr. Benedetto.

On page 178, EH, line 3 - p. 180, l. 22, the Court and Mr. Liotti have a discussion concerning Mr. Kaufman's statement.

> THE COURT: Yes, I think there has to be some end to the inquiry. I think that Mr. Manning has been the only assistant who has handled the case from the time it was assigned for the purposes of investigation and prosecution and he has testified fully with respect to the role the May '79 statement played or did not play with respect to the investigation.
>
> I really don't see, even if we assumed that further inquiry would show that there was heightened interest in Mr. Benedetto, that that would vitiate these proceedings so long as there was not a utilization of the material.
>
> Aren't you really arguing against transactional immunity?

MR. LIOTTI: Your Honor, it may come down to that.

THE COURT: My question is isn't that really simply another way of characterizing transactional immunity? You may not use, that is use immunity, nor you are suggesting may you proceed with respect to that transaction because of what you learned about it. It seems to me that that is simply a minor variation on transactional immunity.

MR. LIOTTI: Your Honor, I think it may evolve into that, but we won't know what the understanding of the government was concerning immunity until we are able to examine Alan Kaufman and Miss Neiman.

THE COURT: What do they have to do with it? They weren't the parties to the meeting in May of '79. You have examined the agent.

MR. LIOTTI: Your Honor, we learned for the first time today that apparently there was an open question in the U.S. Attorney's office concerning this issue of immunity as typified by Mr. Kaufman's memorandum. Mr. Kaufman, who is an eminently - -

THE COURT: Please, please, how can you say that when you have known since the first hearing or since before the first hearing that Mr. Manning treated that statement as something which should not be utilized for purposes of the investigation. So, obviously, there was a determination made by the U.S. Attorney's office with respect to the utilization of that statement.

You haven't learned that for the first time this afternoon.

MR. LIOTTI: *Your Honor, the only thing*

I knew about Mr. Kaufman's statement before today was that he apparently prepared some very brief memorandum which Mr. Manning apparently glanced at. Now we find out today that the memorandum had some specific language relating to immunity. *We don't know what use was made of this statement, Defendant's A, between May of 1979 and August 1979. I think that Mr. Kaufman can enlighten us on that point as well as Miss Neiman.*

It becomes a very, very critical issue as to whether this tainted evidence was used and to what extent it was used while the question of immunity was outstanding.

I think there was conscious - -

THE COURT: *The sole purpose of a further inquiry is the utilization, if any, between May and August of '79 by Kaufman and Neiman of that statement?*

MR. LIOTTI: *The United States Government, your Honor. I am not restricting this to Miss Neiman. We don't know as a result of Mr. Manning's testimony here today what use was made of this statement by Agent Fuller or Agent Zane or anyone else connected with the FBI.* (Emphasis added.)

Again, Mr. Liotti attempts to explain to the court that Mr. Manning was not able to explain or inform the court as to the use to which various individuals had put the statement, including, but not limited to, Agent Fuller, Agent Zane, Miss Neiman and Mr. Kaufman.

The above facts are an attempt to bring to the court's attention the fact that AUSA Manning could not explain what use was made of the 26-page German statement by Agent Fuller and what use was made of that statement by Miss Neiman and Mr. Kaufman. The following statements will clearly show that AUSA Manning did read the statement, notwithstanding his claim that he did not read it until two days after Benedetto's cross-examination had begun.

AUSA Litt, on direct examination, asks AUSA Manning whether Agent Fuller gave him "anything else" at the first meeting between himself and Agent Fuller, which occurred on or about August 20, 1972 (EH, p. 135, line 2 to p. 136, line 2.)

> Q. Did he give you anything else at that time?
> A. I do not know whether at that first meeting he gave me anything else, but certainly within the next day or so I received a 26-page statement on FBI stationary purporting to be a statement of Paul Roberts DiBenedetto.
> Q. And is this the statement which you understand is the basis of

this hearing?

A. Yes. It is a statement which supposedly was taken on May 23, 1979.

Q. What did you do with respect to this statement?

A. There was a reference - - I read a portion of that statement to determine the basis for the reference in Mr. Benedetto's letter of August 13, 1979 which referred to a full grant of immunity.

Q. *Do you recall how much of that statement you read?*

A. *I do not.*

Q. What did you do after you read this portion of the statement?

A. Not finding a reference to any immunity, I asked Special Agent Fuller to determine where or what occurred that gave rise to Mr. Benedetto's statement in his letter that he be granted immunity. (Emphasis added.)

It is a fact that the FBI's transcription of the German statement did not contain that immunity statement.[9] Therefore, AUSA Manning must have read the whole statement to come to

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[9]EH, p. 155, lines 11-22:

Q. Are you familiar with this statement appearing on that tape which you just listened to: "A statement that you do make to the German police at this time will not be held against you in the United States courts in the event of any eventual prosecution of yours, except for impeachment purposes if you take the stand in your defense in any subsequent criminal trial." Do you recall that being on the tape of that interview?

A. It is not in the FBI tape. I believe it is on the tape that Mr. Roberts made, prior to the start of our official recording in the West German statement.

the conclusion that he could not find any reference to immunity.

Furthermore, on page 163 (EH) line 20 - p. 164, line 12, AUSA Manning, while being cross-examined by Mr. Liotti, was asked:

> Q. Mr. Manning, I am going to place before you the document which Mr. Litt has just given me, and ask you if that is the document.
> A. Defendant's Exhibit A is the document that I kept in my files.
> Q. Would you examine it, please, and tell me whether those are the marks which you made on the document?
> A. *On page 1 in the first line there is a mark I made on that document.* Page 3, an X on the bottom paragraph *I do not believe* is a mark that I made. Page 4, strike lines on either side of the first full paragraph and the second full paragraph *I do not believe* are my markings nor are the markings on page 5. *Page 25, I believe the pencil marking is mine.* (Emphasis added.)

Further support that AUSA Manning read the 26-page German statement is contained in AUSA Manning's OWN AFFIDAVIT sworn to on April 27, 1981, wherein it states:

> . . . at that time, I read some portion of the May 23, 1979 statement. *I cannot presently recall*

> *if I read all of the statement or only part, but I do recall reading some portion of it . . . .*

and,

> . . . I placed my copy of the May 23, 1979 statement in my files and *have not read it since August, 1979.* I recalled having made a couple of typographical corrections on the copy of Benedetto's statement that I retained. On March 30, 1981, *in an attempt to refresh my recollection as to how much of the statement I had read, I flipped through the statement to determine where my typographical corrections were . . . .* (Emphasis added.)

AUSA Manning testified at the evidentiary hearing that he made a mark on page 1 and a pencil mark on page 25. In his affidavit, he explained that he attempted to determine how much of the statement he read by looking for his typographical corrections.

The German statement was not considered tainted until August 20, 1979. Between May 23, 1979, the date of the German interview, and August 20, Agent Fuller submitted his case to Miss Neiman on the 24th of May, 1979 for a prosecutorial opinion. He also submitted it to Alan Kaufman for a prosecutorial opinion

on August 14, 1979, even though Agent Fuller had been investigating Benedetto et al since 1977. It is also evident that AUSA Manning had, in fact, read the German statement.

The judge totally ignored defense attorney's request for in-court testimony of the government agents who had dealt with the tainted material and chose only to form an opinion predicated on the testimony of AUSA Manning even though a full reading of Manning's testimony clearly discloses that he was completely familiar with the tainted document and it had probably been utilized by the Justice Department in making its determinations for prosecution and further testimony presented to the Grand Jury.

Summary

From all of the foregoing, it can be concluded of the German statement as follows:

1. That it was utilized by Agent Fuller.
2. That it was utilized by Miss Neiman on the 24th of May for her prosecutorial opinion.

3. That it was submitted to Kaufman for his prosecutorial opinion.

4. That it was utilized by AUSA Manning prior to the commencement of trial.

5. That Agent Fuller was in possession of the statement from an early date in May, 1979 through the date of trial.

It can, therefore, be safely assumed that the German statement was definitely used in this prosecution.

Defense Counsel Liotti requested the trial judge for a proper hearing of the Justice Department employees who had utilized the document; and the judge, in error, chose not to authorize such a hearing, but instead relied only on the testimony of AUSA Manning to determine what use was made of the German statement.

REASONS FOR GRANTING THE WRIT AS TO QUESTION I

The question presented for review is whether Benedetto has been deprived of a fair trial due to the trial court's denial of certain pretrial motions, one of which (reading of exhibits) was so important that it was raised 2 months after indictment. Thereafter, it was re-praeciped many times in an attempt to convince the court of its significance. However, the importance of the pretrial requests for reading of the exhibits does not belie the significance of the petitioner's requests in duplicate that all 3500 material be delivered 2 weeks prior to trial and that he be provided with a specialized secretary.

Further, petitioner has no doubt that each denied request had an effect diametrically opposed to the exercise of his constitutional right to confront witnesses and to effective assistance of counsel, and resulting in absolute denial of his right to due process of law.

Few could effectively argue that these

rights are anything less than the backbone of a civil and criminal justice system created for the exact purpose of insuring that every individual involved in a dispute litigated through the system is accorded 'his day in court.'

In the instant case, Paul Roberts Benedetto seeks a trial which gives him an adequate opportunity to participate in the constitutional rights accorded sighted individuals and further asks that this court determine what safeguards were/are necessary to insure Benedetto's enjoyment of those constitutional rights.

Petitioner and five others were charged with varying numbers of wire and mail fraud, and a charge of inducing a victim to travel in connection with a scheme to defraud. In addition to the complexity of a multi-defendant trial, there were 8 'victims', each with his own loan application portfolio and story to tell. Each defendant had his own defense which was antagonistic to each other.

This was a major document case, involving

approximately 20,000 pages of exhibits and/or material that qualified for 29 USCA 3500 treatment. The documents involved were technical and inter-related financing obligations, letters of credit, and insurance guarantees based upon foreign and domestic laws.

There is no doubt that this trial, spread over a 10-week period, was difficult for all involved. However, Benedetto had the same difficulties as the others, plus problems attendant to his blindness, of which the court was certainly apprised but chose to ignore.

This writer has made and is confident that his research for legal authorities, utilizing extensive manual and computerized research[10] was more than adequate. The research indicates this situation is a case of first impression at both the state[11] and federal levels.

The Illinois Supreme Court, in *People*

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[10] Services of Ex Libris Research Corp., Suite 1400, 600 Renaissance Center, Detroit, MI 48243, utilizing LEXIS. Actual terms were, as run 10/29/82: Library GENFED, FILE: CASES--HANDICAP! or BLIND! or DEAF! W/25 (effective or ineffective W/2 Assistance) or (adequate or inadequate W/2 representation.)

[11] Defendant did not run LEXIS at state level.

ex rel Lowell v. Myers v. Briggs, 263 NE 2d 109, 46 Ill 2d 28, discussed this defendant's position relative to the constitutional issues presented. *Briggs*, supra, states at 113:

> The general rule in handling the trial of a criminal defendant who is handicapped by deafness, blindness, or other affliction is that *a trial judge should afford such a defendant reasonable facilities for confronting and cross-examining the witnesses as the circumstances will permit.* He need only give such aid to intelligent appreciation of the proceedings as a sound discretion may suggest. The fact of blindness or deafness of the accused may lessen the ability and capacity of the defendant to utilize his constitutional rights, but this will not prevent his being subject to trial. In the proper administration of Justice, however, the trial court should give a person accused of a crime a reasonable opportunity to obtain the benefit of his constitutional rights. If he is deaf, such opportunity as may be necessary should be allowed for communication to him of the testimony of the witnesses to ensure him a full and fair exercise of his legal rights. The exact manner in which this result should be arrived at must depend on the circumstances of the case and to a considerable extent, be left to the sound discretion of the court. 14 Am Jur Sec. 181, page 892. (Emphasis added)

Although the court's ultimate interest in *Briggs*, supra, was, as stated in headnote [5] p. 113, whether:

> [a] handicapped [defendant] facing an indefinite commitment because of the pending indictment against him should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released.

it is evident that under Illinois law, the trial court must provide reasonable facilities for a handicapped defendant to permit him utilization of his constitutional rights.

Benedetto firmly and unequivocally states that the trial court did NOT exercise its sound discretion so as to minimize the effect of Benedetto's visual impairment on the exercise of his constitutional rights. Admittedly, granting defendant's pretrial motions would have possibly resulted in a longer trial, and maybe a more expensive trial, but should those considerations dictate the loss of rights secured by the constitution? Undoubtedly, this situation could have been handled so as to minimize the time and cost factors by a little considered thought. Instead, the trial judge chose to expedite the hearing to the detriment of Benedetto's constitutional rights.

In fact, the trial court refused to hear the testimony of Louis Rigdon, from the Department of Justice, who could have suggested possible problems that could be expected and could have advised the court of the appropriate steps to counteract those problems. Clearly, the time devoted to such a hearing would not have been unjustified or unreasonable in terms of the purpose for which it was sought and offered to the court.

The evidence used to convict the petitioner was based upon thousands of pages of documents introduced into evidence and testified to by various witnesses. However, the trial court refused to vary the court room procedure to permit Benedetto the opportunity to examine documents placed into evidence in the only way he could, by having someone read the documents to him.

Unquestionably, sighted defendants confronted with documentary evidence are, and always have been, permitted to examine the contents with their attorneys. It is, there-

fore, inconsistent to permit a defendant who has full use of all senses such an opportunity and at the same time deny that opportunity to a defendant who possesses one less sense.

This court, while discussing the importance of the right to confrontation and cross-examination in *Green v. McElroy*, 360 US 474, 496, 3 LEd 2d 1377, 79 SCt 1400 (1958) stated:

> . . . the evidence used to prove the government's case *must be disclosed to the individual* so that he has an opportunity to show that it is untrue. *While this is important in the case of documentary evidence*, it is even more important where the evident consists of the testimony of individuals . . . (Emphasis added.)

The court in *Green*, supra, at 496, continued its discussion on the right to confrontation and cross-examination and states:

> This court has been zealous to protect these rights from erosion . . . not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny. . . .

It is self-evident that a defendant, whether visually impaired or not, is effectively prevented from exercising his right to confrontation and cross-examination if denied

access to information contained in documents introduced into evidence and discussed by a government witness. Further, the trial court's denial of Benedetto's motion requesting that all 3500 material be released and submitted to him two weeks prior to trial resulted in further destruction of his right to confrontation. The trial court failed to realize that it was impossible for someone to read Benedetto all documents classified as 3500 material even if they were, in fact, delivered to Benedetto 2 days prior to testimony as ordered. Further, no doubt exists that the trial court's refusal to provide a specialized secretary interfered with the possibility that those documents could have been read to and heard by Benedetto and utilized during cross-examination.

In *Davis v. Alaska*, 415 US 308, 315, 39 LEd 347, 94 SCt 1105 (1973), the court quoted Wigmore:

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of *cross-examination*. The opponent demands

> confrontation not for the idle purpose of gazing upon the witness or of being gazed upon by him, but for the purpose of cross-examination which cannot be had *except by the direct and personal putting of questions and obtaining immediate answers.* S. J. Wigmore, Evidence, Sec 1395, p. 123 (3d Ed 1940) (Emphasis by court.)

If a document is being discussed by a witness or if there is 3500 material, should a defendant be denied the information contained therein because of an impairment that renders him less able to obtain that information?

The Supreme Court in *Kerby v. United States*, 174 US 47, 55, 56,43 LEd 890, 19 SCt, 574, referred to the right of confrontation as:

> [O]ne of the fundamental guarantees of life and liberty and a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution of the United States and in the constitutions of most if not all the states composing the union. Mr. Justice Stone, writing for the court in Alford v. United States, 282 US 687, 692, declared that the right of cross-examination os "one of

> the safeguards essential to a fair trial."

Benedetto also maintains that by being denied an adequate opportunity to have the 3500 material read to him and by being deprived of the contents of the documents produced into evidence he has been denied the effective assistance of counsel. What good is, and how effective is, counsel if the defendant is denied access to information necessary to plan a cross-examination strategy and to be able to question the witness' understanding of the document.

In *Powell v. Alabama*, 287 US 45 77 LEd 158, 53 SCt 55 (1932), it states:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be denial of a hearing, and therefore, of due process in the constitutional sense.

Although the definition of due process is in some ways difficult to define precisely, it is certainly evident that the term refers to and requires that a defendant be treated

fairly.

> It is evident that the due process clause imposes its procedural safeguards only to protect certain vital interests, namely: Life, Liberty, and Property. *Lipp v. Board of Education of City of Chicago,* 470 F2d 802.

and

> The present concept of due process stems from the American ideal of *fairness in the treatment of all.* (Emphasis added.) *Howard v. US,* 372 F2d 294 Cert Den 87 SCt 2129, 388 US 915, 18 LEd 2d 1356.

and finally,

> Minimal due process requirements are neither an inflexible structure nor graven in stone. *US ex rel Richardson v. Wolf,* 525 F2d 797.

In addition to the above problems, the Petitioner had an attack of hypertension as described in the statement of facts.

On September 21, 1981, Mr. Liotti expressed his doubts concerning Benedetto's ability to participate in his own defense and ability to follow the proceedings because the medication prescribed made him incoherent and lethargic. The court decided that night at 7:00, after a phone call to Dr. Landau, that the proceedings could continue.

In *US v Hatrack*, 563 F2d 86, the court addressed the issue of the effect of defendant taking certain drugs on his competency and ability to assist in his own defense. At 92, the court cited a lower court opinion:

> *It is beyond peradventure that to bring a legally incompetent defendant to trial would vacate due process.* Drope v. Missouri, 420 US 162, 95 SCt 896, 43 LEd 2d 103 (1975); Bishop v. United States, 350 US 961; State v. Spivey, 65 NJ 21 (1974); State v. Auld, 2 NJ 426 (1949). *Thus when a bona-fide doubt is raised as to a defendant's competency to stand trial, the court must conduct a hearing to resolve the issues.* Drope v. Missouri, supra; Pote v. Robinson, 383 US 375 (1966); State v. Spivey, supra. The test of competency to stand trial is that enunciated in Dusky v. United States, 362 US 402 (1960); [Whether a defendant] . . . has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. (Emphasis added.)

Further, in *Drope v. Missouri*, 420 US 162, 43 LEd 2d 103, 95 SCt, 896, 908, the court states:

> Even when a defendant is competent at the commencement of his trial, *a trial court must always be alert to circumstances suggesting a change*

> *that would render the accused unable to meet the standards of competency to stand trial.* (Emphasis added.)

In *Hansford v. United States*, 365 F2d 920, 923 (1966) the court recognized the rather self-evident medical fact that

> . . . the effect of narcotic use will vary depending on the amount of drugs taken, the degree of tolerance developed by the individual and the idiosyncratic reaction of the person to the drugs. *For this very reason, only by a hearing can it be determined whether any particular defendant is incompetent because of his use of drugs.* (Emphasis added.)

Further, in an important footnote in *Hansford*, supra, (Footnote 8, p. 923) the court states the minimum requirement for such a hearing:

> The hearing, of course, need not be a lengthy and involved proceeding. However, *as a minimum*, we think the inquiry *must be of record* and both parties *must be given* the opportunity to examine all witnesses who testify or report on the accused's competence. The trial court *would not* be free to base its decision on material not in the record or *on private conversations with doctors who had examined the defendant.* (Emphasis added.)

In the instant case, defense attorney brought Benedetto's reaction to the prescribed

drugs to the court's attention. However, the court failed to conduct the required hearing and did, in fact, decide Benedetto's competency in a phone conversation without the presence of either the AUSA or the petitioner's attorney present. The result was that during the remainder of the trial, Benedetto was even more unable to follow the proceedings and testimony than before.

In conclusion, Benedetto's defense attorney offered the trial court the opportunity to hear testimony of Louis Rigdon of the Justice Department relative to the potential problems and their effect on Benedetto's constitutional rights; however, the trial court refused that offer of input.

Additionally, the trial court erred when it decided that 3500 material would not be delivered 2 weeks before trial when it was evident that the sheer bulk of material prevented it from possibly being read to Benedetto. Further, complicating Benedetto's ability to defend himself was the fact the

the court refused to order all exhibits discussed by a witness read to him. In addition, the court's failure to provide a specialized secretary made it impossible to review the day's testimony, prepare questions, have documents read to him.

Furthermore, the trial court failed to conduct a hearing addressing Benedetto's attorney's concern that the drugs prescribed to control defendant's hypertension rendered him unable to assist in his own defense. The record is completely devoid of any testimony from any doctor as to Benedetto's competency and no opportunity was provided for either the prosecution or defense to cross-examine the doctors most familiar with Benedetto's condition and that condition's effect on Benedetto's constitutional rights.

Because the court failed and refused to take necessary precautions to insure that Benedetto could utilize his constitutional right to confront witnesses and an adequate opportunity to cross-examine those witnesses,

he was denied his right to effective assistance of counsel and therefore denied a fair trial and the justice intended to permeate the right to due process of law.

REASON FOR GRANTING THE WRIT AS TO QUESTION II

The question presented for review addresses the sufficiency of the evidentiary hearing as a whole and while doing so, addresses a divergent attitude of the Federal Court of Appeals for the 2nd Circuit with another Federal Court of Appeals. It appears that the 2nd Circuit does not recognize as significant, or has a more restricted view of, the "use" to which an immunized statement may be put than other circuits.

Agent Zane's grant of immunity given at the time of the taking of the statement in the presence of the German police and an FBI translator, granted a minimum of use immunity to the petitioner. Nevertheless, the Assistant U.S. Attorney made use of its contents prior to trial. (Discussed more fully below.)

Benedetto also complains that the trial court failed to conduct a full and complete evidentiary hearing which complied with the government's obligation and standard as set

forth in *Kastigar v. United States*, 32 LEd 2d 212, 92 SC 1653 (1971), that being the "heavy burden" at 461 and "affirmative duty" at 460, to prove non-use of the immunized statement. In that regard, the trial court and the Court of Appeals for the 2nd Circuit apparently considered the evidentiary hearing adequate. The petitioner firmly states that an evidentiary hearing in which only the prosecuting Assistant U.S. Attorney testified as to the taint issue was clearly inadequate. This is especially true when we consider that AUSA Manning was assigned to the case 3 months after the first use and 6 days after the second use. In addition, he clearly did not have personal knowledge concerning the use to which the immunized statement was put by Agent Fuller, Neiman, and Kaufman. In fact, the record shows numerous unanswered questions, some of which appear in the Statement of the Case herein. A reading of the evidentiary hearing will show conclusively that the testimony of Agent Fuller, Neiman and Kaufman is

absolutely necessary in order for the trial court to determine whether the 26 page statement was used.

There Is a Divergent Opinion
On An Important Federal Question

The trial court and the Federal Court of Appeals for the Second Circuit have decided a federal question in conflict with a decision of the Court of Appeals for the Eighth Circuit.

The purpose of the evidentiary hearing was to determine

> . . . whether the investigation which led to the indictment in this case is, in fact, a product of that statement or leads contained in that statement or is based on an independent source. (The Court, EH, p. 130, lines 4-8.)

Testimony from AUSA Manning indicated that he read the 26-page German statement. Contrary to the holding of the 8th Circuit Court of Appeals in *United States v. McDaniel*, 482 F2d 305 (1973), the trial court and the 2nd Circuit Court of Appeals in the present case failed to realize the impact of that reading. The Court of Appeals was informed of AUSA Manning's reading of the immunized statement

but chose not to comment on it or make any determination whatsoever as to the use immunity argument.

On virtually identical facts, the Court of Appeals for the 8th Circuit held in *McDaniel*, supra, at 311:

> We find, however, that even though the voluminous reports which we have examined, may have afforded proof of an independent source of evidence adduced at McDaniel's trial, such reports nevertheless *fail to satisfy the government's burden of proving that the United States Attorney, who admittedly read McDaniel's grand jury testimony prior to the indictment, did not use it in some significant way short of introducing tainted evidence.* See Supreme Court, 1971 Term, 86 Harv L Rev 181, 186 (1972); note, Standards for Exclusion in Immunity Cases after *Kastigar* and *Ziccarelli*, 82 Yale L.J. 171, 185, 186 (1972.) *Such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.* (Emphasis added.)

There can be no doubt that *McDaniel*, supra, applies to the facts in the instant case. AUSA Manning admits he read the immunized statement and that reading occurred prior to

indictment.

The *McDaniel*, supra, court goes on to address why it came to the decision it did.

> Kastigar, after all, proscribed "any use, direct or indirect..." and indeed, if the immunity protection is to be co-extensive with the Fifth Amendment privilege, as it must be *to be constitutionally sufficient then it must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury.*

The court, in *McDaniel*, supra, continues at 312:

> Thus, although he asserts that he did not use McDaniel's testimony in any form, we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case. We agree with Judge Metzner that "[i]t is difficult for the court to speculate as to the effect that the reading of the minutes might have had on the conduct and thinking processes of the [prosecutor.]" United States v. Dornau, supra.

It is Benedetto's position that the trial court and the Court of Appeals for the 2nd Circuit are equally unable to determine the impact of the 26page statement on AUSA Manning. However, it is evident that the 26-

page statement had an affect on Agent Fuller, for, suddenly, on the day following the taking of the statement from Benedetto and after conducting an investigation since 1977, he felt compelled to request a prosecutorial opinion of Miss Neiman. It is obvious that Agent Fuller's rush to obtain a prosecutorial opinion indicates that he believed it to be a substantial and important find. Benedetto maintains that AUSA Manning found it to be equally so.

The court discusses, in *McDaniel*, supra, at 312, the difficulty of the government complying with its "heavy burden" under *Kastigar*, supra.

> The three volumes of transcripts in which McDaniel fully confessed his misdeeds were read in their entirety by the U.S. Attorney 3 and 8 months, respectively, before the two federal indictments were handed down. Furthermore, they were read when the U.S. Attorney was unaware that the testimony came pursuant to a grant of immunity and he therefore could have perceived no reason to segregate McDaniel's testimony from his other sources of information. Under these circumstances, we are of the opinion that the government is confronted with an insurmountable task in

discharging the "heavy burden" of proof imposed by Kastigar. In that regard, we note with interest that in United States v. Dornau, 359 F Supp 684 (S.D.N.Y. 1973) District Judge Metzner recently arrived at a similar conclusion on strikingly, similar facts, stating:

> "[O]nce the subject matter was touched upon in the privileged testimony and the prosecutor had read it, he could have used it in a variety of ways in this criminal prosecution. The possibility of such use, and the impossibility of clearly showing that the use did not occur calls for the holding in this case that the defendants were denied the constitutional protection that their silence would have given them."

Similarly, in the instant case, there are substantial reasons why the indictment should be dismissed. AUSA Manning states that he did not use the statement against Benedetto, but at the same time, he claims that he cannot presently recall how much of the statement he read. If, in fact, AUSA Manning is being truthful when he states that he can't remember how much of the statement he read, how could he possibly know that he did not use the statement in some significant way short of

using it as evidence at trial. How could he begin to separate in his mind the tainted from the legitimate and at some time satisfy the "heavy burden" requirement under *Kastigar*, supra.

In addition, Agent Fuller, as main investigator, supplied Manning with all the evidence ultimately submitted at trial. Therefore, AUSA Manning's use of evidence derived from or through Agent Fuller was tainted by Fuller's knowledge of the statement. If we consider briefly again Fuller's 'beeline' directly to Miss Neiman, one day after obtaining the statement, it becomes highly probable that the statement must have provided Fuller with one or more previously missing elements or provided Fuller with knowledge used to link previously possessed, but disjointed, information. AUSA Manning, as beneficiary of Fuller's knowledge, used that information against Benedetto in violation of *McDaniel*, supra, and that court's interpretation of the scope of *Kastigar*, supra. Therefore, AUSA

Manning would have had to first separate his own taint, created by his reading, and then separate Agent Fuller's taint from the remainder. For all of the foregoing, AUSA Manning cannot ever prove that he did not use the statement against Benedetto under *McDaniel*, supra.

Kastigar, *Murphy*, and *McDaniel* Apply

Kastigar, supra, held, in essence, that use and derivative use immunity under 28 USCA Sec. 6002, was co-extensive with the privilege against self-incrimination and therefore, where one is granted immunity under this section, he could be compelled to testify over his Fifth Amendment objections. Admittedly, petitioner was not granted statutory immunity, as was Mr. Kastigar, and ordered to testify over claim of his privilege against self-incrimination.

However, on May 22, 1979, Benedetto told Agent Zane that he would not cooperate without an immunity agreement. On May 23, 1979, Benedetto and Zane discussed Benedetto's Fifth Amendment rights, and he again requested

an immunity agreement which was given.[12] Thereafter, in the interview, petitioner participated by reason of, and under the protection of, a grant of immunity:

> Any statement that you do make to the German police at this time WILL NOT BE HELD AGAINST YOU in the United States courts in the event of any eventual prosecution of yourself, except for impeachment purposes if you take the stand in your defense in any subsequent criminal trial. (Emph. add.)

Except for the possibility that the German statement could be used for impeachment purposes the above grant is equivalent to the immunity provided by 28 USCA 6002 in that the agreement would prohibit any governmental use that resulted in the German statement being "held against" him.

In spite of the fact that Benedetto was not compelled to testify over his Fifth Amendment rights as was Mr. Kastigar, the legal principles contained in *Kastigar*, supra, apply in this case. See *United States v.*

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[12]See Brief in Support of Defendant's Motion to Quash Indictment pursuant to immunity granted by Officer Robert Zane, FBI, dated April 24, 1981.

McDaniel, supra, where McDaniel's attorney found 3 N.D.C.C. Sec. 16-20-10[13] which provided transactional immunity automatically and encouraged McDaniel *"To appear before the State Grand Jury and fully divulge all his illegal actions."* State charges were thereafter dropped based upon this statute, but the Federal Court refused and ultimately convicted him. McDaniel appealed and the Court of Appeals ruled that the U.S. Attorney's reading of the Grand Jury testimony "constituted a prima facie 'use' of it . . ." and remanded for an evidentiary hearing to determine if he testified under grant of immunity; and, if so, whether the testimony related to subject matter of Federal prosecution. The trial court conducted the evidentiary hearing and dismissed McDaniel's indictment. The U.S.

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[13] "No person shall be excused from attending and testifying ...before any court upon any investigation...for a violation of...section 16-20-08, upon the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate...him. No person shall be prosecuted nor subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence...." (Footnote as printed in 307 of *McDaniel*, supra.)

appealed, contending that, although the statute conferred automatic immunity, his voluntary seizure of that opportunity to gain absolution of his wrongs resulted in a waiver of the immunity. The court held, at 309:

> The essence of this argument is the contention that unless McDaniel first invoked the Fifth Amendment and then was told that Sec. 16-20-10 granted him immunity, he was acting voluntarily and thus waived the statutory protection. *But the Supreme Court held precisely to the contrary in a case involving a federal statute worded similarly* to Sec. 16-20-10. See United States v. Monia, 317 US 424, 430 63 SCt 409, 87 LEd 376 (1943). Accord, State v. Hennessey, 195 or 355 245 P2d 875, 881 (1952) (en banc). Furthermore, it is not intended that McDaniel lost the privilege as to any portion of his testimony by volunteering non-responsive confessions in an attempt to acquire immunity for crimes not under inquiry. Cf. United States v. Wilmington Chemical Corp. 254 F Supp 92 (N.D. Ill. 1966.) *Accordingly, we find no error in Judge Benson's conclusion that McDaniel's testimony was covered by a grant of immunity.* (Emphasis added.)

In *McDaniel*, supra, *Kastigar* was applied to Mr. McDaniel based upon an automatic grant of immunity in which he spoke openly to obtain absolution of all crimes he had committed. Therefore, *Kastigar*, supra, certainly applies

to the petitioner when he cooperated after having a discussion concerning immunity, and after having received a grant of immunity to induce him to waive his Fifth Amendment rights.

There can be no doubt that *Kastigar*, supra, applies to the petitioner herein.

Summary

Contrary to the Eighth Circuit realization in *McDaniel*, supra, the trial court and the Second Circuit Court of Appeals have failed to realize the impact of AUSA Manning's reading of the immunized statement.

The Eighth Circuit suggested various ways in which the testimony could be used, including, but not limited to, focusing the investigation, deciding to initiate prosecution, and interpreting the evidence.

The petitioner understands that under *McDaniel*, supra, AUSA Manning could not possibly separate the tainted from the legitimately obtained government information. AUSA Manning

could not even recall how much of the statement he had read, nor could he have been able to exclude the tainted evidence provided him by Fuller, Neiman, and Kaufman from his mind or conduct during trial.

It is evident that had the instant case arose within the 8th Circuit's jurisdiction, the result would have been entirely different and in fact, would have been dismissed.

When different determinations are made in two different Federal Courts of Appeal, it is this court's duty to inquire and resolve the conflict. Only by this Honorable Court's considered inquiry and resulting decision can Benedetto's conviction stand without doubt.

Even if dismissal is not dictated, this case must be remanded for a full and complete evidentiary hearing, it being Benedetto's position that the trial court could not possibly determine the actual use of the statement without the presence of Agent Fuller, Miss Neiman and Mr. Kaufman.

The record is replete with numerous instan-

ces where AUSA Manning could not answer questions that should have been posed to one of the three aforementioned individuals.

Furthermore, at a minimum, the petitioner maintains that Agent Fuller's testimony is absolutely necessary to make the evidentiary hearing anything but a total farce and miscarriage of justice. Because of the logical nexus between the statement's creation and its submission by Fuller, in one form or another to Miss Neiman and Mr. Kaufman, and the assignment of the case to AUSA Manning, it appears that all parties were tainted in one way or another; and that the taint was transferred by Fuller to all supervisory Justice Department personnel who dealt with the statement. Consciously or unconsciously, the tainted information submitted to them was used to determine that a case was warranted against Benedetto.

How the trial court could accept as complete AUSA Manning's input as to the use of the statement prior to the time he was assigned the case

is perplexing and unacceptable. AUSA Manning's partial testimony at the evidentiary hearing on taint has certainly not approached, much less met, the "heavy burden and "affirmative duty" standards set by *Kastigar*, supra.

ADDITIONAL REASON FOR GRANTING WRIT

Under 29 USCA 794, "any program or activity conducted by any Executive agency" was required to promulgate rules and regulations to insure non-discrimination against any handicapped person.

It is evident that the United States Department of Justice and the Federal court systems have not yet complied, although each has had five (5) full years to do so.

In fact, William Bradford Reynolds, Assistant Attorney General of the U.S. Department of Justice admits his department's non-compliance in a letter to the Hon. Daniel Moynihan which states in part:

> . . . we recognize that the statute provided imposes an obligation to provide effective communications to persons with visual impairments . . .

If the Department of Justice had complied with the rules and regulations promulgated thereunder, it would have provided the petitioner with a right to all of his pretrial motions discussed, supra, including the right to have

all exhibits transcribed into Braille.

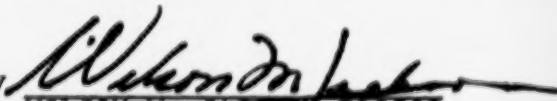
The Department of Justice's non-compliance has deprived the Petitioner of a fair trial because there is no doubt that he was discriminated against on account of his visual disability.

RELIEF

WHEREFORE, the Petitioner prays that a Writ of Certiorari issue from this Honorable Court and that it reverse and remand, with orders to dismiss, the indictment; or in the alternative to remand for a full and complete evidentary hearing with orders that Agent Fuller, Miss Neiman and Mr. Kaufman testify as to their knowledge of taint.

Respectfully submitted,

JACKSON & LASKA, P.C.

By 

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